



November 18, 1998

The Board of Directors  
Upper Gunnison River Water Conservancy District  
275 S. Spruce  
Gunnison, CO 81230

The Board of County Commissioners  
The County of Gunnison  
200 East Virginia  
Gunnison, CO 81230

The Board of County Commissioners  
The County of Hinsdale  
Courthouse  
Lake City, CO 81235

The Board of County Commissioners  
The County of Saguache  
Courthouse  
Saguache, CO 81149

Re: WATER AVAILABILITY FOR TRANSMOUNTAIN DIVERSION -  
CONSEQUENCES OF FURTHER TRANSMOUNTAIN DIVERSION

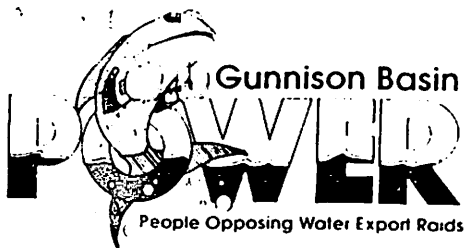
Ladies and Gentlemen:

We have met with the Gunnison River District Board twice to: (1) discuss whether any water remains in the Colorado River System for transmountain diversion after all legal claims against such waters have been met; (2) to persuade it that no unclaimed water is available for transmountain diversion; and (3) to discuss the unfortunate and dire consequences which would occur if more water than that already diverted were to be diverted to the Front Range. In explaining the amount of water available, we have relied upon figures provided us by the State of Colorado Engineer's office as well as the Bureau of Reclamation. Both of these sources basically agree with each other to an acceptable degree. The purpose of this letter is to present our concerns (1) regarding the interactions between the provisions of the Colorado River Compact and transmountain diversion, and (2) to discuss present and future courses of action to alleviate such.

### HISTORY OF THE RIVER

The Colorado River Compact was executed in 1922, and was finally approved by all of the states involved. Arizona, the last signatory, signed it in 1944. In 1963, Glen Canyon Dam was constructed across the Colorado River and began to store water in Lake Powell. All of the waters of the Colorado River above Lee Ferry, AZ, have already been or surely will be claimed with earlier entitlement dates than any water hereafter sought to be diverted to the Front Range of Colorado.

### COLORADO RIVER COMPACT REQUIREMENTS



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The Colorado River Compact imposes certain duties and obligations on the Upper Basin State in favor of the Lower Basin below Lee Ferry. See the attached Exhibit "A", two pages of the Compact with relevant provisions highlighted. Article III (a) apportions to each basin 7,500,000 acre feet of water per annum. By sub-paragraph (b), it allows the Lower Basin to call upon an additional 1,000,000 acre feet per annum for beneficial consumptive use. Under paragraph (c), it provides that Mexico shall have an entitlement to Colorado River System water, determined by treaty to be 1,500,000 acre feet per annum. If there is any shortage in this quantity passing the United States' border, it shall be furnished equally by the Upper and Lower Basins, the Upper Basin's measured at Lee Ferry. Finally at paragraph (d) the compact provides that the Upper Basin shall not withhold water thus causing the flow of water of the Colorado River at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet in a 10 year moving average.

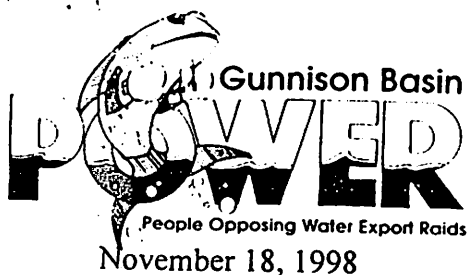
The measurement of the water to be apportioned and divided by the Compact between the Upper and Lower Basin States is at Lee Ferry, Arizona, a place very near the border between Utah and Arizona, just below the Glen Canyon Dam and Page, Arizona.

The Compact does not provide that the Upper Basin States may lay claim to waters flowing into the Colorado River from streams such as the Virgin, Paria and the Gila Rivers in Arizona or at other sources below Lee Ferry: therefore these waters may not be counted to make up the amount apportioned to the Lower Basin States under Article III (a) (b) (c) or (d).

The Compact is silent as to what penalties will be imposed for its breach. Experience would indicate, however, from the happenings in connection with the Two Forks Dam project and the Arkansas River dispute with Kansas, that the contest would be resolved by a Federal referee, at least in the first instance, strongly biased in favor of strict Compact compliance.

### ACTUAL DIVERSIONS AND SHORTAGES

The information available to POWER consists of records furnished by the Department of Natural Resources -- Colorado Water Conservation Board, and the United States Department of Interior-- Department of Reclamation. Those figures show that at the present time and under the present entitlement by the Lower Basin States, the historic flow at Lee Ferry has provided some amount more than 7,500,000 acre feet of water to the Lower Basin States each year since 1965. It further shows that if and when the Lower Basin States place a call under Article III (b), the Compact requirements would be met much less frequently. Specifically, during the 46 years between 1953 and 1998, obligations would have been met 39 years; slightly more than 80% of the time. The amount of the annual flows during the short years varies from year to year. The annual shortage in acre feet of water is not insignificant. In addition to the 7,500,000 and 1,000,000 acre feet of



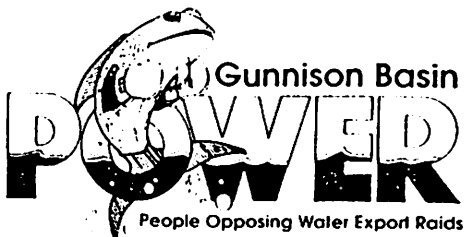
## WATER REQUIREMENTS IN THE LOWER BASIN STATES

Can any informed person believe that California, particularly the Los Angeles region, will not want to use an additional 1,000,000 acre feet per annum? An automobile trip through that area will disclose that retirement and business communities are popping up like cacti in the desert. We recently noticed an item in a newspaper during October 1998 which indicates that Las Vegas, Nevada will receive title to 27,000 surrounding acres of dry land from the Government. That amounts to over 42 square miles of land, a large portion of which Las Vegas intends to subdivide and sell for residential purposes. Las Vegas is sorely pressed for enough water to satisfy existing residential, business and commercial needs. To ask whether it could use additional water out of the 1,000,000 acre feet apportioned the Lower Basin States in Article III (b), is to ask a question which needs no answer.

## POWER'S RECOMMENDATIONS

We recommend that the Upper Gunnison River Water Conservancy District and the Counties of Gunnison, Saguache and Hinsdale jointly seek to terminate future Front Range efforts to divert additional water from the Colorado River System. Perhaps the best plan would be to try to obtain the agreement of large water users such as Denver, Colorado Springs, Northeastern, Central and the South East Water Conservation Districts that they will no longer seek to divert additional waters, and that they will oppose any further Front Range diverter's efforts to do so. It is probably too late in the game to call the Colorado Supreme Court's attention to the fact (in the present suit with Arapahoe County,) that considering the implications of the Compact, there is no undecreed water available for trans-mountain diversion in the Colorado River System, although the advice from the attorneys opposing the Arapahoe case needs to be sought on this point.

Perhaps the most reasonable way of obtaining a halt to further transmountain diversions would be through legislative action. The Constitution of Colorado provides at Article XVI, Sections 5 and 6, that the unappropriated waters of every stream in Colorado are the property of the public and dedicated to the use of the People of Colorado, and that the right to divert unappropriated waters should never be denied. If the argument presented in this paper holds water, there is no unappropriated water in the Colorado River System and the General Assembly would be justified in so declaring. Such justification would be to: (1) prevent huge sums of money being spent to divert water which would not be available for diversion considering the Compact, to (2) prevent the construction of houses and creation of businesses in the belief that water existed whereas in fact it did not, and to (3) avoid economic hardship and social disruption which will follow the seemingly endless efforts on the part of the Eastern Slope water users to take water from the Colorado River System. Most importantly, (4) any action Colorado users take which would



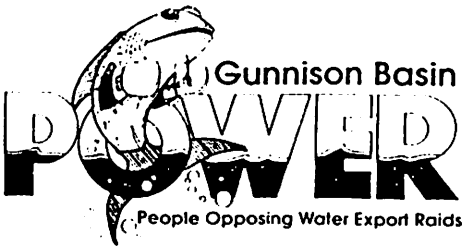
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Compact obligation to the Lower Basin States, the duty to supply water to Mexico, under its treaty entitlement of 1944, amounts to 1,500,000 acre feet per annum with the Upper and Lower Basin States each providing one half thereof. Thus Upper Basin States must provide up to 750,000 acre feet per annum in case Mexico is shorted and decides to place a call, which call would require the Upper Basin States to furnish a total flow at Lee Ferry of up to 9,250,000 acre feet per annum. We at POWER have been advised by representatives of the Colorado Water Conservation Board that Mexico has not yet called upon its yearly entitlement. Apparently Mexico does not want to jeopardize its relations with the United States during the period of the NAFTA negotiations. It is as sure as most anything in this old world, during these changing times, that Mexico will call upon its entitlement sooner than later. If Mexico's entitlement is considered, shown by column D of figures on "Exhibit B" attached hereto, the Upper Basin States could have fulfilled their compact requirements in only 17 of the past 46 years or slightly more than one third of the time.

There is another potential call upon the Colorado River that would seriously affect Colorado and the Upper Basin States. The Compact at Article VII provides that nothing in the Compact shall be construed as affecting the obligation of the United States to the Indian tribes. There are several tribes which could make a claim to the waters of the Colorado River. The Colorado Supreme Court has indicated in connection with its ruling regarding the reserve water rights of the United States, that the Indians' water rights will be quantified and established. Such rights will predate and supercede most of the water rights existing in Colorado. It is certainly not possible at this time to say what the effect of the Indian claims will amount to, but one can almost be sure it will not be de-minimus. The existence of the Indian claims alone makes further transmountain diversion speculative.

### **COLORADO'S HISTORY OF DISAPPOINTMENTS**

Colorado has battled with its downstream neighbors on several occasions concerning its shorting them of water due them under interstate compacts. Specifically, it has been involved in litigation with Wyoming, Nebraska, Kansas, Texas and New Mexico. In each and every dispute, Colorado has lost. The penalty for not complying has varied from case to case. In the current suit with Kansas, which was the latest fiasco, Colorado will probably be required to make up the determined water shortage and pay Kansas for the damages it has incurred. Colorado was warned 90 years ago this would happen. What happens when Colorado is required to terminate water rights to which its citizens have become accustomed to using is indeed traumatic and damaging.



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further decrease water flows to the Lower Basin States and Mexico would likely cause them to end their consent to water shortages and require the Upper States to deliver each year and in total all the water the Compact allots them. We in Colorado should not kick the sleeping dog by increasing Lower Basin water shortages. We think the time has come for the water using entities in Gunnison, Saguache and Hinsdale Counties to band together to present a united front to set in place a permanent injunction or prohibition of any further efforts to divert water from the Colorado River System in Colorado, out of the basin.

Finally, (5) we should on a stepped up basis, continue our efforts to educate people on the Front Range of the need to discourage and terminate further transmountain diversion.

Sincerely yours,

POWER

*P.C. Klingsmith*  
P.C. Klingsmith, Chairman  
Power Steering Committee

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the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

### Article III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a) the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The states of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governor of the signatory states and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the Legislative ratification of the signatory States and the Congress of the United States of America.

### Article IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purpose of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any state within its boundaries of the appropriation, use and distribution of water.

EXH 'A'

## Article V

The Chief Official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall co-operate, ex officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

## Article VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

## Article VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

## Article VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of waters in the Lower Basin, against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

## Article IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

## Article X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

## Article XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

EXH "S"  
Pg 2



# HISTORIC FLOW AT LEE FERRY

1953-1995

Unit: 1,000 cfs

<b>A</b>	Water Year	Ending	Start
<b>B</b>	Method	Flow	G.C.F. + 1000 + 750
<b>C</b>			
<b>D</b>			
<b>E</b>	Progressive	10-Year	Total

Year	Method	Flow	Progressive	10-Year	Total
1953	8.005	8.118	✓	80,016	80,000
1954	8.118	7.507	✓	83,146	77,248
1955	8.118	8.750	✓	78,240	78,240
1956	7.507	17,340	✓	80,708	78,240
1957	8.750	14,260	✓	79,308	78,240
1958	17,340	9,182	✓	82,530	82,530
1959	14,260	8,788	✓	87,843	87,843
1960	9,182	8,360	✓	88,268	88,268
1961	8,788	8,323	✓	84,280	84,280
1962	8,360	10,850	✓	87,782	90,044
1963	8,323	8,318	✓	86,748	90,125
1964	10,850	20,818	✓	108,368	108,368
1965	8,318	19,108	✓	118,201	128,573
1966	20,818	18,868	✓	131,754	131,754
1967	19,108	13,450	✓	131,016	131,016
1968	18,868	7,985	✓	128,075	128,075
1969	13,450	8,231	✓	127,754	127,754
1970	7,985	7,862	✓	126,075	126,075
1971	8,231	8,111	✓	118,371	118,371
1972	8,111	8,002	✓	108,158	108,158
1973	8,002	8,137	✓	96,555	96,555
1974	8,137	8,506	✓		
1975	8,506	8,505	✓		

Storage in Fleming George and Navajo Reservoirs began in 1902.

Storage in Glen Canyon Reservoir began in 1963.

Based upon provisional streamflow records subject to revision.

Note: The 1985 flow is 8,485,100 cfs, at Lees Ferry, Arizona and 18,643 cfs at the Fortu River.

1996  
1997  
1998

1152  
1318  
1321

FXH "B"